Petition

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SUPREME COURT U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 81-5104

EDWARD BARRY, Petitioner

-v-

THE STATE OF NEW JERSEY, Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF NEW JERSEY

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Public Defender of New Jersey

By: RANDALL W. WESTREICH
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July 14, 1981

QUESTION PRESENTED

FOR REVIEW

Was the confession of defendant, obtained after the confrontation of defendant with a co-defendant's confession, obtained during the course of defendant's illegal arrest and detention of some 18 hours, the result of the expolitation of that arrest, or was it instead, the product of defendant's free will?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No._____

EDWARD BARRY, Petitioner

-v-

THE STATE OF NEW JERSEY, Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF NEW JERSEY

Petitioner Edward Barry respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of New Jersey, entered in this proceeding on May 23, 1981.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey State v. Barry, 86 N.J. 80 (1981) is reproduced in the Appendix hereto. The Appellate Division opinion, State v. Barry, 171 N.J. Super 543 (App. Div. 1979) is also reproduced in the Appendix.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on May 23, 1981, and this petition for certiorari was filed within 60 days of that date.

The jurisdiction of this court to review the final judgment of a State court by certiorari is conferred by 28 U.S.C. sec. 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person by subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

United States Constitution, Amendment XIV (adopted 1868):

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

The sole evidence to be admitted against the defendant, connecting him to the felony murder of a policeman and a conspiracy to commit the same, was his own statement. This statement was made after the defendant had been illegally arrested and held for some eighteen hours. During the course of this unlawful detention, defendant was placed in three different jails. No one spoke to him. During this time, the police fortuitously obtained the confession of another co-defendant, one Archie Murphy, which implicated the defendant. When told of this, the defendant confessed.

The facts surrounding defendant's arrest are sparse. Standing in front of his apartment house, a large multiple dwelling home, along with five people and two children, the defendant was arrested by several police officers. These officers had come to execute an arrest warrant for another, Archie Murphy, who lived there. When one detective saw him, he recognized him from having questioned him in another homicide eleven months earlier. The defendant was arrested on the spot. No reason was given. Defendant was not questioned as the detective had nothing to question him about.

The crimes defendant was charged with arose out of an armed robbery of a bank and a struggle resulting in the shooting of a police officer. The alleged conspiracy included Mark Jackson, the gunman, Archie Murphy, the man who provided the plans and the guns, defendant's brother Walter Barry, who stood guard outside the bank with a gun, and the defendant, who remained in the car.

The money was traced from Murphy's possession to a list of "bait money" bills supplied by the bank. The get-away car was found in Walter Barry's possession two days later. The guns were retrieved by the police.

During his Miranda hearing, the defendant challenged the admission of his statement as the product of an unlawful arrest, lacking probable cause and inadmissible under Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). The trial court found the arrest to be valid, based upon probable cause, and further distinguished the applicability of Brown v. Illinois.

The Appellate Division found probable cause to be totally lacking. (See appendix pp. 1-8 attached hereto). It further found no intervening events to break the chain from unlawful arrest to the confession and reversed the defendant's conviction.

The Supreme Court of New Jersey, Justice Sullivan speaking for the majority, reversed the Appellate Division's opinion and held the confession to be admissible as a product of the defendant's free will rather than tainted by the unlawful arrest. (See Appendix, pp. 8-23 of the Supreme Court opinion). A dissent was filed by Justice Pashman. (See Appendix, p. 24ff.)

REASONS FOR GRANTING THE WRIT

The majority opinion of the Supreme Court of New Jersey is in conflict with the Fourth, Fifth and Fourteenth Amendments of the federal constitution and the decisions of this court, specifically Brown v. Illinois, 422 U.S. 590, 95 S. Ct 2254 (1975), 45 L. Ed. 2d 416, and Dunaway v. New York, 442 U.S. 200, 99 S. Ct 2243, 66 L. Ed. 2d 824 (1979). This opinion further is in conflict with several state courts of last resort and federal courts of appeal.

The resolution of the issues involved will be far reaching in their impact and ought to be definitively resolved by this court so that the rights guaranteed by these above-mentioned amendments be adequately protected.

ARGUMENT

In both Brown v. Illinois and Dunaway v. New York this court considered the "fruit of the poisonous tree doctrine." When a citizen is arrested without probable cause as defendant was, and held until he confesses, the State has the burden of showing that this confession was a product of the defendant's free will rather than the result of that unlawful detention. Unless the State can establish the confession is so attenuated from the illegality of the arrest so as to be a product of the defendant's free will, it is inadmissible.

This exclusionary rule is one aimed primarily at the protection of a defendant's Fourth Amendment rights. Its application forbids the use of evidence unconstitutionally obtained and seeks to deter the lawless conduct of police

officers, who without it, might arrest upon mere suspicion, hopeful that given enough time, they might produce some incriminating evidence.

The court's scrutiny in a case such as this goes far beyond a consideration of the Miranda requirements for the confession. Compliance with them will do nothing to alleviate the unlawful arrests and detentions.

> If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted...arrests made without warrant or without probable cause, for questioning or "investigation", would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings.
>
> Brown v. Illinois, 95 S. Ct. at 2261.

Thus, Miranda warnings are but a threshold issue. As Dunaway v. New York notes at 60 L. Ed. 2d p. 840, law enforcement officers cannot violate the Fourth Amendment with impunity, safe in the knowledge they could wash their hands in the "procedural safeguards" of the Fifth.

In addressing this particular problem, this court has established that three factors are to be considered in determining whether a confession is obtained at the expense of the illegal arrest. They are: (1) the time factor between arrest and confession, (2) the purposefulness and flagrancy of the police conduct, and (3) presence of an intervening event to break the causal chain of unlawful arrest to confession.

It seems that while the majority opinion of the New Jersey Supreme Court paid lip service to these considerations, it, along with several courts of other jurisdictions, failed to evaluate them in a meaningful way consistent with the philosophy of the opinions of this court.

A. INTERVENING EVENT

The primary focus of the majority opinion was that despite the illegal arrest and the continued detention of the defendant for eighteen hours without speaking to him or charging him with a crime, the confession of another, fortuitously implicating him, served to make his confession a product of his own free will. Specifically, it found the fact that the police told the defendant he had been implicated by the co-defendant Archie Murphy, and had shown him the guns used*, served as an "intervening event."

Confronting a defendant with evidence of another's confession was rejected by the Appellate Division which saw the obvious danger:

> Whether or not an illegal arrest effectively produces an ensuing confession cannot be determined by the successful progress of the police investigation after the arrest but before the confession. The capacity for undermining the essence of Fourth Amendment protection inherent in such an approach is as obvious as it is infinite. Rather than deterring arrests based on the rawest unfounded suspicion, it would encourage such arrests by assuring the police that illegal arrests wouldbe retrospectively validated so long as subsequent investigation turned up facts which if known at the time of the arrest would have provided probable cause therefrom.
>
> State v. Barry, App. p. 5.

Further, it would seem, as Justice Pashman makes in his dissent, App. p. 24 ff, that confronting the defendant with evidence of guilt was rejected as a "intervening event"

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*Defendant notes that while the guns had been retrieved at the time of defendant's confession, the record shows they were actually shown to the defendant during the taking of the confession itself, not before. (5T 69-70, 114, 7T 79-86)

While neither Brown nor Dunaway define "intervening circumstances" expansively, there is an emerging pattern to be found in these cases as well as the ones they cite. They involve releasing a defendant from custody, representation by counsel talking with a family member, or an appearance before a Magistrate for a probable cause hearing. (See e.g. Johnson v. Louisiana, 406 U.S. 356, 365 (1972), Wong Sun v. United States, 371 U.S. 471 (1963), and Parker v. North Carolina, 397 U.S. 790 (1970), and numerous others).

The thrust of these cases on the issue of intervening event is the only policy that makes sense - it requires that the illegally detained defendant make contact with someone independent of law enforcement in a nonfined setting. And see Rawling v. Kentucky, -- U.S. --, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980) where a congenial detention in defendant's own house during which time evidence presented by a friend evoked a spontaneous admission from defendant, which is likewise consistent.

Nowhere is further evidence of guilt found during the illegal custodial detention period deemed sufficient. Surely, to confront the defendant with evidence of guilt in a continuing custodial detention is but an exploitation of the unlawful situation itself. (See 3 W. LaFave, Search and Seizure § 11.4 at 638 ff. (1978). And while it may give the police the probable cause it needed in the first place for the arrest, it does not break the chain and make the confession a product of defendant's free will. (see State v. Barry, Pashman, dissenting App. pp. 32-33).

Indeed, were this to be sufficient, the police would have little incentive to refrain from arresting and detaining upon mere suspicion, hoping to turn up something.

Defendant notes there are several state court and federal court cases which discuss the confrontation of an illegally arrested defendant with evidence obtained during the unlawful detention in deciding whether the confession is the "fruit of the poisonous tree" and hence, excludable. These opinions are in conflict. (See e.g. Commonwealth v. Wright, 460 Pa. 247, 332 A 2d 809 (1975), Commonwealth v. Barnett, 471 Pa. 34, 369 A 2d 1180 (1977), People v. Gabbard, 78 Ill 2d 88, 398 NE 2d 574 (1979), United States v. Morris, 597 F 2d 341 (2nd Cir. 1979), United States v. Butler, 495 F. Supp. 679 -- (E.D. Ark. 1980).

Surely, the theory espoused by the New Jersey Supreme Court is in conflict with the underpinnings of Brown and Dunaway. Defendant urges this court to take this case to resolve the question of what is meant by an "intervening event."

B. TIME FACTOR

The State argued below and the New Jersey Supreme Court endorsed the concept that the longer the illegal restraint, the less the evil. Despite the inherently coercive and outrageous action of illegally arresting and holding a man for eighteen hours, moving him to three different jails, never charging him with anything or speaking to him, the court holds that this did not contribute to defendant's decision to confess because there was a great lapse of time.

Absolutely nothing in Brown and Dunaway support such a distorted rendering of the time factor. In fact, Brown itself cites State v. Henderson, 485 F 2d 266 (6th Cir. 1973) cert. den. 415 U.S. 266 (1974), to illustrate this point, and it involved the suppression of a statement 42 hours after the arrest. Surely, illegal custody becomes more oppressive as it continues uninterrupted and unabated. Indeed, to urge that the defendant was not frightened, surprised and confused with this situation and this did not increase with the passage of time is absurd. Absent any intervening circumstances, the longer the time period, the more grievous the violation. See Dunaway v. New York, 60 L. Ed. 2d at 841 opinion of Justice Stevens, concurring:

> "[i]f there are no relevant intervening circumstances, a prolonged detention may well be a more serious exploitation of an illegal arrest than a short one."

The passage of a long period of time should not work against the defendant as the court holds, but should serve to point out the flagrancy and illegal purpose of the police in holding a citizen incommunicado for hours without speaking to him.

Surely, the logical conclusion of this New Jersey opinion is to promote the holding of a suspect on raw suspicion as long as possible with the blind hope of coming up with something that might induce a confession.

Defendant notes there are a variety of lower court opinions which tend to emphasize this particular point with conflicting results. See e.g. United States v. Gaines, 552 F 2d 618 (7th Cir. 1977), Logan v. Capps, 555 F 2d 937 (5th Cir. 1976), Williams v. State, 348 N E 2d 612 (Indiana 1976), State v. Weekes, 268 N W 2d 705 (Minn 1978), Martin v. Commonwealth, 592 S W 2d 134 (Ky 1979), and People v. Gabbard, supra.

The fact that some courts do endorse this distorted rendering of the time factor, i.e. the longer the illegal confinement the less likely it is to have been exploited, should not continue. This court should take this case to clarify for the courts of this country what role the time factor plays and to ensure that the power to arrest not be abused.

C. FLAGRANCY OF POLICE MISCONDUCT

At the outset, there is no doubt that what occurred here was an arrest of a man without even a pretext of probable cause. No facts were ever articulated to link defendant with any crime. Standing outside of his home, an apartment where a co-defendant lived, having a brother who was a suspect and being questioned nearly a year earlier is lacking in qualifying for probable cause in any respect. This man was picked up solely on the basis of an officer's familiarity with him.

Absent probable cause it would seem that the purposefulness of this police conduct is apparent, yet astonishingly the New Jersey Supreme Court first suggests good faith as a mitigating factor. It finds the familiarity and associations led to an "innocent although unreasonable belief in probable cause." Dunaway's arrest was based on an unsubstantiated tip. This would seem to have resolved the suggested argument that the police acted in "good faith" and should lead to the conclusion that even if they did act in good faith it is of no consequence in evaluating the purposefulness of the police actions.

Next the court strains to find that the arrest was not "investigatory" so it can be distinguished from Brown and Dunaway. This rendering is based upon the fact that defendant himself was not questioned while he was illegally held during this time. Defendant would submit that the arrest was investigatory in the broadest sense of the word and that he was the victim of an unlawful "dragnet" police action designed to frighten and compromise him. Following

the arrest he was ignored and held unlawfully for eighteen hours with the hope that something might turn up.

Nowhere is the harm inherent in the continued unlawful detention of the defendant dealt with by the New Jersey Supreme Court. The effect of this action upon a citizen is virtually ignored and the conduct is held to be neither flagrant nor purposeful. It strains crudulity to find that this conduct was not calculated, purposeful, flagrant and a bald abuse of power. This is precisely the type of activity the Fourth Amendment was designed to stop.

Opinions in the wake of Brown v. Illinois and Dunaway v. New York, such as this one, indicate an unwillingness to apply the teachings of those opinions and to employ the exclusionary rule when it is called for. Conduct such as that which occurred in this case poses a severe threat to individual liberties.

> When police purposely effect an illegal arrest or detention in the hope that custodial interroqation will yield incriminating statements, the deterrence rationale for application of the exclusionary rule is especially compelling.. Judicial integrity is especially compromised when evidence purposefully acquired through such invasions of constitutional rights is used to convict...
>
> United States v. Perez Esparza, 609 F 2d 1284 (9th Cir. 1980)

A fuller discussion of the time factor, intervening circumstances, and purposefulness of the police actions will not only serve to enlighten the judiciary of this land as to what is meant by the Fourth Amendment, but will ensure that the police do not profit from wholesale violations of the rights of its citizenry.

CONCLUSION

For the reasons stated herein, a Writ of Certiorari should issue to the judgment and opinion of the Supreme Court of New Jersey.

Respectfully submitted,

STANLEY C. VAN NESS
Public Defender of New Jersey

BY: Randall W. Westreich
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July 14, 1981

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1239-76

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EDWARD BARRY,

Defendant-Appellant.

Argued November 14, 1979 - Decided DEC 28 1979

Before Judges Lora, Antell and Pressler.

On appeal from the Superior Court, Law Division, Essex County.

Mr. Randall W. Westreich, Designated Counsel, argued the cause for the appellant (Mr. Stanley C. Van Ness, Public Defender, attorney).

Mr. John L. Whalen, Assistant Essex County Prosecutor, argued the cause for the respondent (Mr. John J. Degnan, Attorney General of New Jersey, attorney; Mr. Donald S. Coburn, Prosecutor of Essex County, of counsel).

The opinion of the court was delivered by

PRESSLER, J.A.D.

Edward Barry appeals his conviction of felony murder and conspiracy to commit armed robbery. We are constrained to reverse.

These convictions arise out of the armed robbery of the First Federal Savings and Loan in Montclair on January 12, 1976. The dramatis personae involved in the crime were Mark Jackson, Archie Murphy, defendant, and defendant's brother Walter Barry. The plan

was for Jackson to actually enter the bank and hold it up, for Walter Barry to cover Jackson immediately outside the bank and for defendant to wait in and drive the getaway car which was parked some short distance away. The three were then to return to Murphy's East Orange apartment from whence the expedition originated to divide the proceeds. The terrible tragedy of this event, which took place generally according to plan, was that Jackson while in the bank shot and killed a Montclair police officer.

On the day following the robbery, the Montclair Police Department received a telephone call in which the anonymous caller described the automobile used in the holdup. That information was immediately teletyped to law enforcement agencies and on the same day an automobile answering that description and being operated by Walter Barry was stopped by the East Orange Police Department. Walter was taken into custody by the East Orange police, interrogated, and returned to Montclair. Jackson was identified by the bank's video tape and a warrant issued for his arrest. Thereafter, a warrant was issued for Murphy's arrest. On the evening of January 15, 1976, three days after the robbery, Detective Flaminio of the Essex County Prosecutor's homicide squad, accompanied by a squad investigator and two Montclair police officers, went to Murphy's East Orange apartment to execute this warrant. When they arrived, Flaminio saw defendant standing in a group of about five other people and two small children in front of the apparently rather large apartment building in which Murphy resided. Recognizing him from his investigation of a year earlier of another robbery, Flaminio immediately placed defendant under arrest, gave him his Miranda warning, and arranged for his transport to a jail

facility in Glen Ridge. Neither Flaminio nor anyone else appears to have interrogated him at that time. After the arrest of defendant, Flaminio proceeded to execute the Murphy warrant.

A search of Murphy at the jail revealed his possession of a five dollar bill taken from the bank during the robbery. Sometime thereafter, in the early morning hours of January 16, Murphy gave the police a statement not only incriminating himself but also identifying defendant as the driver of the getaway car. This was the first implication of defendant since Jackson and Walter Barry, although they had previously given statements, had implicated only themselves and each other.

Some hours following Murphy's statement, after defendant had been in custody for some 17 or 18 hours, he was transported from the Glen Ridge jail to Montclair where he was questioned, apparently for the first time since his arrest. The two Montclair police officers who were conducting the interrogation reiterated the Miranda warnings and told defendant that the other three participants had given written statements and that he, defendant, had been implicated. Thereupon, defendant admitted his participation and agreed to give a full statement.

Defendant's primary ground of appeal is that the trial court erred in admitting his own inculpatory statement into evidence. It is his contention that his warrantless arrest was illegal since at the time he was arrested, the arresting officer had no probable cause to believe that he, defendant, was in any way at all connected with the bank hold-up or indeed any other crime. If the arrest was illegal, he argues, then the confession obtained as a result thereof

is the classical "fruit of the poisonous tree" and is itself inadmissible. See Wong Sun v. United States, 371 U.S. 471, 488 (1963).

We have no doubt that defendant's general contention is a correct statement of constitutional law. If Brown v. Illinois, 422 U.S. 590 (1975), could possibly be read as having failed to definitively settle the issue, there is nothing in the slightest degree ambiguous about the holding of Dunaway v. New York, ___ U.S. _____, 60 L.Ed.2d 824, 840 (1979). Dunaway stands unequivocally for the principle that if a warrantless arrest lacks probable cause, a confession resulting from that arrest is inadmissible and remains inadmissible despite any solicitude shown for defendant's rights by the police following the illegal arrest. As succinctly articulated by Dunaway, supra, the Constitution does not permit "law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the 'procedural safeguards' of the Fifth."

The threshhold issue, therefore, is whether defendant's warrantless arrest by Flaminio was based on probable cause. Our scrutiny of the record constrains us to disagree with the trial court's conclusion that there was a showing of probable cause here. In our view a structure supporting probable cause cannot be erected on the basis of the officer's prior acquaintance with defendant resulting from a year-old robbery investigation and, even if known to the officer, defendant's relationship to and friendship with the other participants in the Montclair hold-up. We are aware of no attempted definition, however elastic, of the elusive concept of probable cause - - that state of knowledge and belief which is more than suspicion but less than sufficient evidence

to sustain a conviction - - which can be stretched sufficiently to encompass what was here virtually no more than an officer's instinctive but factually unsupported response to a familiar face, linked to the crime under investigation by nothing more than sheerest conjecture. See, e.g., Wong Sun v. United States, supra; Brown v. Illinois, supra; State v. Davis, 50 N.J. 16, 22-24 (1967) cert. den. 389 U.S 1054 (1968). Cf. State v. Bradshaw, 170 N.J. Super. 527 (App. Div. 1979).

Since we are persuaded that the arrest was illegal, the inadmissibility of the confession necessarily follows provided that no "intervening events broke the connection between * * * [defendant's] illegal detention and his confession." Dunaway v. New York, op. cit., supra. The State argues that Murphy's confession, which provided the first link between defendant and the crime, constituted just such an intervening event. We are unable to agree. Whether or not an illegal arrest effectively produces an ensuing confession cannot be determined by the successful progress of the police investigation after the arrest but before the confession. The capacity for undermining the essence of Fourth Amendment protections inherent in such an approach is as obvious as it is infinite. Rather than deterring arrests based on the rawest unfounded suspicion, it would encourage such arrests by assuring the police that illegal arrests would be retrospectively validated so long as subsequent investigation turned up facts which if known at the time of the arrest would have provided probable cause therefor. Furthermore, we are satisfied that the cause and effect relationship between the arrest and the confession clearly depends on the defendant's perception of his situation rather than upon the perceptions of the police. The defendant here was arrested and kept incommunicado for 18 hours. At the end

of that time he was interrogated and told he had been implicated by an accomplice. From his point of view there was no intervening event but rather only an uninterrupted intensification of his perception of his peril. Thus, we cannot but conclude that the illegality of the arrest here must be deemed to have produced the confession and to have irretrievably tainted it. Compare People v. Scott, 600 P.2d 68, 69 (Colo. Sup.Ct. 1979); People v. Misuis, 47 N.Y.2d 179, _____, 419 N.Y.S.2d 961, 963 (Ct. App. 1979); People v. Vese, 417 N.Y.S.2d 1015, 1022 (Sup.Ct. 1979).

Since our holding in respect of the confession requires that defendant be retried, we address those additional issues defendant here raises which are likely to reoccur. Defendant urges first that the court erred in refusing to admit into evidence the statements of his brother and Jackson which tended to exculpate him. Jackson's confession stated that only he and Walter Barry were in the car during the robbery, that Walter Barry had driven it and that no one else was present either in the car or at the bank. Walter Barry's statement was of similar import. Both unequivocally stated that no one other than they participated in the crime. We are unable rationally to distinguish the facts here from those underlying the holding of State v. Abrams, 140 N.J. Super. 232 (App. Div. 1976), aff'd o.b. 72 N.J. 342 (1977), which required admission of similar accomplice statements. We are bound by the Supreme Court's affirmance of this court's view of Evid. R. 63(10) even though we recognize the cogency of the State's argument that it is not necessarily against a declarant's interest to exculpate one defendant while inculpating himself. Accordingly, on the retrial, defendant will be entitled to introduce this evidence on his behalf.

The defendant further argues that the prosecutor's actions

denied him a right to a fair trial, that the trial judge himself failed to conduct the trial in an impartial manner and that his right to confrontation was violated by the prosecutor's improper elicitation of testimony that a non-witness co-conspirator had implicated defendant. Our review of the record, however, satisfies us that each of these issues is clearly without merit. R. 2:11-3(e)(2). We do not address defendant's challenge to the sentence, namely, that the consecutive nature of the sentence on the conspiracy charge was unduly punitive and manifestly excessive. In any event, defendant will have to be resentenced if he is convicted on the retrial.

Reversed and remanded for a new trial.

A TRUE COPY

Elizabeth M. Langhlin

Clerk

SUPREME COURT OF NEW JERSEY
A-22 - SEPTEMBER TERM 1980

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

EDWARD BARRY,

Defendant-Respondent.

Argued October 7, 1980 -- Decided May 21, 1981

On certification to the Superior Court, Appellate Division, whose opinion is reported at 171 N.J. Super. 543 (1979).

Hilary L. Brunell, Assistant Essex County Prosecutor, argued the cause for appellant (John J. Degnan, Attorney General of New Jersey, attorney; Donald S. Coburn, Essex County Prosecutor, of counsel).

Randall W. Westreich, Designated Counsel, argued the cause for respondent (Stanley C. Van Ness, Public Defender, attorney).

The opinion of the Court was delivered by

SULLIVAN, J.

Defendant Edward Barry was convicted of felony murder and conspiracy. He was sentenced to life imprisonment for the felony murder and a consecutive term of two to three years for the conspiracy. On appeal, the Appellate Division, in an opinion reported at 171 N.J. Super. 543 (1979), reversed the judgment of conviction and ordered a new trial on the

ground that defendant's confession, introduced into evidence at his trial, should have been excluded as the fruit of an illegal arrest. The Appellate Division also held that defendant should have been allowed to introduce into evidence the confessions of co-conspirators Mark Jackson and Walter Barry (defendant's brother) which did not implicate defendant as a participant in the criminal episode.[1] The Appellate Division said that the confessions were statements against the penal interests of the declarants and admissible under Evid. R. 63(10). The State's petition for certification was granted. 84 N.J. 388 (1980). We now reverse and reinstate the judgment of conviction.

The State's proofs at trial showed the following. On January 12, 1976, defendant Edward Barry, his brother Walter Barry, Archie Murphy and Mark Jackson planned the robbery of the First Federal Savings and Loan Association of Montclair. They first met at an apartment in East Orange. Murphy supplied the guns to be used in the robbery but did not go to the bank. Defendant drove the getaway car to and from the bank. His brother Walter Barry, armed with a sawed-off shotgun, stood outside the bank as a backup man. Mark Jackson, armed with a revolver, entered the bank and committed

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1 Jackson had pleaded guilty. Walter Barry had been tried separately and convicted.

the actual robbery which netted approximately $1,700. Included in these robbery proceeds was a package of "bait money."[2] During the course of the robbery, Jackson shot and killed Sergeant Alfred Sellick of the Montclair Police Department who was on special assignment at the bank. Defendant then drove his brother and Jackson back to the apartment where Murphy was waiting and the money was divided.

The next morning an anonymous phone call tip was received at Montclair Police Headquarters describing the automobile used in the robbery. On the following day, Walter Barry was apprehended while operating the car in question and brought to headquarters for questioning. In the meantime the police, possessing information concerning a suspect in another bank robbery, and having viewed a concealed bank camera videotape of the First Federal robbery, obtained a warrant for the arrest of Mark Jackson. He was arrested on the morning of January 15, 1976 in Newark and taken in for questioning. He later gave a statement implicating himself, Walter Barry and Archie Murphy in the First Federal holdup.

Based on this statement, a warrant for the arrest of Archie Murphy was issued. In the meantime, the police had also obtained a statement from Walter Barry that he and Jackson

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[2] "Bait money" is a special collection of bills, not used in normal banking transactions, for which the bank maintains a record of serial numbers to facilitate the subsequent apprehension of robbery suspects.

alone were involved in the First Federal robbery. On January 15, 1976, at about 7:00 p.m., the police went to an East Orange apartment building to execute the arrest warrant for Murphy. When they arrived at the building, one of the detectives saw defendant Edward Barry standing outside and recognized him from a prior investigation of another robbery. Defendant was placed under arrest and given Miranda warnings. The officers then entered the building, found Murphy in one of the apartments and arrested him. Money which Murphy tried to hide in a sofa as the officers entered the room was confiscated, together with additional currency found in Murphy's pocket.

Defendant and Murphy were initially taken to the East Orange police station and then transported to the Montclair Police Headquarters. Since the Montclair facilities were overcrowded, defendant was transferred to the jail in the neighboring town of Glen Ridge and lodged there overnight.

After Murphy's arrival in Montclair, a comparison of the serial numbers of the bills found in Murphy's possession at the time of his arrest with the bank's record of the "bait money" resulted in the positive identification of one of the bills. Shortly thereafter, at approximately 1:25 a.m. on January 16, 1976, Murphy gave the police a statement implicating himself, Jackson, Walter Barry and defendant in the robbery.

At the time of Murphy's statement, defendant was still lodged in the Glen Ridge jail as a result of his arrest some six hours earlier. On the basis of the Murphy statement, defendant was returned to Montclair Police Headquarters for a court appearance scheduled for 1:00 p.m. later that day in which he was to be formally charged with homicide.

Upon his return to Montclair Police Headquarters, defendant was given Miranda warnings once again and signed a written acknowledgment of their receipt. He was then questioned for the first time and told that Jackson, Murphy and his brother had all confessed to the robbery and that he had been implicated. Defendant was shown these confessions and reviewed their contents with Captain Charles Cummings, Detective Captain of the Montclair Police Department. He was also shown the weapons used in the robbery, as well as the deceased officer's gun, which had all been previously recovered by the police. At this point defendant agreed to confess and proceeded to give a full written statement of his involvement in the criminal episode.

The statement admitted defendant's participation in the planning and commission of the robbery. He identified Archie Murphy, Walter Barry, Mark Jackson and himself as the participants. Defendant stated that while Murphy remained at the apartment, he drove the car to and from the scene of the robbery with Walter Barry and Mark Jackson as passengers.

only the Walter Barry and Mark Jackson confessions into evidence. After his conviction, defendant was sentenced to life imprisonment for the felony murder and a consecutive term of two to three years for conspiracy.

As heretofore noted, the Appellate Division reversed the conviction, holding that defendant's statement should have been excluded as the fruit of an illegal arrest and that the statements of co-conspirators Walter Barry and Mark Jackson were admissible under Evid. R. 63(10). The Appellate Division found all of defendant's other contentions of error were clearly without merit. It did not pass upon the claim of excessive sentence, however, in view of the remand for a new trial.

We consider first the admissibility of defendant's confession. The Appellate Division held that it was the fruit of an illegal arrest and, therefore, excluded it. 171 N.J. Super. at 547-548. We disagree. The appropriate test to be applied in this type of case is whether the confession falls on one side or the other of the line that separates confessions which resulted from an exploitation of an illegal arrest from those which were the product of the defendant's free will, the taint of the illegal arrest having been sufficiently attenuated. See Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975); Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248,

60 L. Ed. 2d 824 (1979); Rawlings v. Kentucky, ___ U.S. ___, 100 S. Ct. ___, 65 L. Ed. 2d 633 (1980); Note, "The Fourth Amendment and Tainted Confessions: Admissibility as a Policy Decision," 13 Houston L. Rev. 753, 771 (1976).

The inquiry for determining whether a defendant's statements are tainted by antecedent illegality is not a factual one, neither of foreseeability on the part of the police, nor of causal connection (the "but for" test having been rejected) but rather is a question of judgment. Considering the purposes of the exclusionary rule in these matters (deterrence of illegal arrests and preservation of the integrity of the judiciary) and the competing purpose of discovering the truth in a criminal trial, the court is required to make a value judgment by considering three factors as they relate to those purposes: the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct. Brown v. Illinois, 422 U.S. at 603-604, 95 S. Ct. at ___, 45 L. Ed. 2d at 427.

The United States Supreme Court recently considered the application of these touchstone factors in Dunaway v. New York, supra. In Dunaway a homicide had been committed during the attempted robbery of a store. An informant told the police that Dunaway was involved in the crime but the information given was insufficient to allow the police to obtain a warrant for Dunaway's arrest. Nevertheless, the police took Dunaway into custody and questioned him after giving him Miranda warnings. While still in custody, he

eventually gave statements and drew sketches implicating himself in the crime. This evidence was used at trial and resulted in his conviction for attempted robbery and felony murder.

The United States Supreme Court reversed the conviction. It held that Dunaway's constitutional rights had been violated when the police, without probable cause to arrest, took defendant into custody and brought him to the police station for questioning. The Court held that the detention for custodial interrogation intruded so severely on interests protected by the Fourth Amendment as to trigger the traditional safeguards against illegal arrest. 442 U.S. at 216, 99 S. Ct. at ___, 60 L. Ed. 2d at 838. After taking into account factors such as the temporal proximity of the illegal arrest and confession, the presence of intervening circumstances and the purpose and flagrancy of official misconduct, the Supreme Court concluded that there was no intervening event which broke the connection between the illegal detention and the incriminatory statements. The giving of Miranda warnings, even though sufficient for Fifth Amendment purposes, was held not to render the connection sufficiently attenuated under Fourth Amendment analysis to permit use of Dunaway's statements at trial. 442 U.S. at 219, 99 S. Ct. at ___, 60 L. Ed. 2d at 840.

We conclude that application of the appropriate Supreme Court test in the instant case does not call for the exclusion of Edward Barry's statement as the fruit of an illegal arrest. Although defendant's

initial detention at about 7:00 p.m. on January 15 was illegal, because the police at that time were without probable cause to arrest, there is no indication that the police attempted to question him then. Some six hours later, however, Archie Murphy, who was arrested with defendant, gave the police a full statement concerning the robbery and implicated defendant as a principal participant. At that point, the police had probable cause to hold defendant as a suspect in the murder investigation. Indeed, it was decided to bring defendant before the court to be charged with homicide along with his three co-conspirators that same day. He was then returned to Montclair Police Headquarters for that purpose. While there, and after having been given Miranda warnings again, he was told that his three co-conspirators had confessed and the contents of those statements were reviewed with him. He was also shown the weapons used in the robbery, as well as the deceased officer's gun, which had been recovered by the police. It was only after these events that defendant gave a full statement of his involvement in the robbery-murder.

We hold that these intervening independent circumstances which preceded defendant's confession effectively purged the taint of his illegal arrest. Statements following an illegal arrest must be excluded from evidence only if they are causally related to the invasion of the suspect's rights.

The instant facts do not present the close causal connection between the illegal seizure and the confession found in Dunaway. 442 U.S. at 218-219, 99 S. Ct. at ___, 60 L. Ed. 2d at 839-840 (1979). The occurrence of other independent causative events including Murphy's confession, which directly implicated defendant, and recovery of the guns, which were shown to defendant, severed any possible chain of causation between the original illegal arrest and defendant's subsequent confession.[3]

There is no suggestion in the instant case that the police were making an investigatory arrest. The facts, while short of establishing probable cause for the initial arrest of Edward Barry, provide the basis for an innocent although unreasonable belief in its existence (defendant, suspected of being involved in a similar prior robbery, having been questioned about same, being the brother of a clearly implicated prime suspect, and found standing in front of the building where another prime suspect was at that moment residing). Furthermore, the subsequent behavior of the police reinforces the lack of investigatory purposefulness in this illegal arrest. Defendant, as heretofore noted, was not questioned until immediately prior to the scheduled arraignment before a

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It should also be noted that defendant was questioned for the first time and his statement taken only after he was being legally held as a prime suspect in the robbery-murder on the basis of the Murphy confession.

While we need not, and do not, base our decision today on that fact, the Second Circuit has strongly indicated that confessions are admissible, despite the prior illegal arrest, if given at a time when probable cause in fact existed. United States v. Morris, 451 F. Supp. 361 (E.D.N.Y. 1978), vacated and remanded, 597 F. 2d 341 (2d Cir. 1979). See also People v. Calhoun, 432 N.Y.S. 2d 226 (App. Div. 1980).

magistrate. In addition, he was once again given full Miranda warnings only moments before the questioning. The United States Supreme Court has recently suggested that such Miranda warnings, although obviously not sufficient standing alone to attenuate the taint of an illegal arrest, are nevertheless an important consideration in determining whether a confession was "obtained by exploitation of an illegal detention." Rawlings v. Kentucky, ___ U.S. at ___, 100 S. Ct. at ___, 65 L. Ed. 2d at 643.

We therefore hold that under the facts of this case the State has met its burden of establishing that the confession was the product of the defendant's free will, rather than the result of the exploitation of an illegal arrest. Considering the purpose and circumstances of the arrest, the lack of temporal proximity between the arrest and defendant's subsequent statement, and the occurrence of other independent causative events, we are satisfied that defendant's confession was properly admitted at trial.

Defendant's further contention, raised for the first time before the Appellate Division, that his confession should be suppressed because he was not taken before a committing magistrate without unnecessary delay following his arrest (see R. 3:4-1) has no merit. Delay is a factor in determining the voluntariness of a confession but does not of itself render an otherwise voluntary confession inadmissible. State v. Seefeldt, 51 N.J. 472, 486 (1968). The trial court, following a hearing on the issue, found defendant's statement was made voluntarily and was therefore admissible in evidence. The record fully supports this determination.

The second question presented is whether defendant should have been allowed to introduce into evidence the confessions of Walter Barry and Mark Jackson. As heretofore noted, these confessions tended to exculpate defendant since they identified Walter Barry as the driver of the car and also indicated that no one else was in the vehicle except Jackson when they drove to the bank and returned to the apartment after the robbery.

Preliminarily, it is clear that the trial court was in error in ruling that a statement against interest is not admissible under Evid. R. 63(10) unless the declarant is unavailable as a witness. The rule is not so limited in its application. State v. Abrams, 140 N.J. Super. 232, 237 (App. Div. 1976), aff'd o.b., 72 N.J. 342 (1977). This does not end the inquiry, however, as the State argues that the exclusion was correct albeit for reasons other than those expressed by the trial court.

The Appellate Division, in holding that defendant should have been allowed to introduce these confessions into evidence, relied on State v. Abrams supra. Abrams involved a joint trial of Barry Abrams and a co-defendant Chenille Smith on a charge of possession and distribution of cocaine. The State's main witness was an undercover detective who testified that he had purchased cocaine from Smith and had seen her

purchase it from Abrams. Smith had confessed that, "I, Chenille Smith, sold Ernest [the detective] a bag of cocaine, but I didn't and never got nothing from [Abrams]." 140 N.J. Super. at 235.

The trial judge allowed the Smith confession to be put in evidence against that defendant but excised therefrom the part which said "but I didn't and never got nothing from [Abrams]" as not within the hearsay exception. Both defendants were convicted. Abrams appealed on the ground that the entire confession, including the part favorable to him, should have been put in evidence. The Appellate Division agreed and reversed Abrams' conviction, holding that the exculpatory part of the statement as to Abrams, in the context of the whole statement, intensified the personal criminal responsibility of the declarant and therefore was admissible under Evid. R. 63(10). Any argument that the declarant had nothing to lose and was solely attempting to shield his compatriots was to be presented to the jury, as such an interpretation goes to the weight of the evidence rather than its admissibility. We affirmed substantially for the reasons given by the Appellate Division. 72 N.J. at 342.

In the present case, the State argues that those portions of the statements of Walter Barry and Mark Jackson which tend to exculpate defendant are clearly separable from

the inculpatory parts and not in any sense against the penal interests of the declarants. The State believes that the exculpatory statements were nothing more than a deliberate attempt to shield the other confederates and not integral parts of the confessions.[4] Arguably, under the standard established in State v. Abrams and summarized above, the statements should have been admitted. We need not, however, evaluate the merits of the State's position, beyond what has been said in State v. Abrams, because even were we to conclude that the statements should have been admitted into evidence, we would nevertheless uphold the conviction on the ground of harmless error.

The record shows that defense counsel, in his cross-examination of Captain Cummings, elicited in considerable detail the fact that both Walter Barry and Mark Jackson, in confessing to their involvement in the criminal episode, had said that Walter Barry drove the automobile to and from the scene of the bank robbery and no one else was with them at the time. Although the trial court sustained the

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[4] As previously noted, Walter Barry had been tried separately and convicted. Jackson had pleaded guilty. Defendant made no effort to call these persons as witnesses.

prosecutor's belated objection that defense counsel was "attempting to use the statement of a co-defendant to prove the truthfulness of something they said," no limiting instruction was given to the jury. Indeed, on more than one occasion defense counsel in his summation to the jury posed the issue to be decided as whether Walter Barry, and not the defendant, was the one operating the car on the night of the robbery. While the statements themselves were not allowed into evidence, the exculpatory parts thereof were fully revealed to the jury and the error, if any, was harmless.

We agree with the Appellate Division's disposition of the other issues raised by defendant and have also considered the claim of excessive sentence. The life sentence for felony murder was mandatory. Adding on an additional two to three years for the conspiracy in the light of this planned criminal episode was not excessive or unduly punitive. The judgment of the Appellate Division is reversed and the judgment of conviction, including sentence, reinstated.

Chief Justice Wilentz and Justices Clifford, Schreiber, Handler and Pollock join in this opinion.

Justice Pashman has filed a separate dissenting opinion.

STATE OF NEW JERSEY,)
Plaintiff-Appellant,)
v.)
EDWARD BARRY,)
Defendant-Respondent.)

PASHMAN, J., dissenting.

Defendant's statement was the only evidence admitted at the trial connecting him to the crimes of which he was convicted. As the State concedes before this Court, defendant was arrested without probable cause in violation of his Fourth Amendment rights. Defendant was then illegally detained for eighteen hours, without seeing anyone except law enforcement officers. Before his arraignment, he was told by the police that several participants in the crime had made statements implicating him. He then gave an inculpatory statement. The majority holds that the occurrence of other causative events including Murphy's confession, which directly implicated defendant, and the recovery of the guns, which were shown to defendant, "severed

any possible chain of causation between the original illegal arrest and defendant's subsequent confession." Ante at __ (slip op. at 11). Because I do not find these intervening events any more significant than the ones in Brown v. Illinois, 422 U.S. 590 (1975), where the Supreme Court suppressed the defendant's confession, and because I believe that suppression of defendant's statement is necessary to deter similar police conduct, I dissent.

I

The primary purpose of the exclusionary rule is to deter violations of the Fourth Amendment. The rule "compel[s] respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960). In determining when it is necessary to exclude an incriminating statement obtained after an unreasonable search or seizure, the Supreme Court has focused on the question whether "the connection between the

lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'" Wong Sun v. United States, 371 U.S. 471, 487 (1963). By focusing on "the causal connection between the illegality and the confession," Brown v. Illinois, 422 U.S. 590, 603 (1975), the attenuation doctrine serves to indicate when exclusion is necessary to further the purpose of deterrence. See Dunaway v. New York, 442 U.S. 200, 217-18 (1979). When there is a close causal connection between an illegal arrest and a confession, it is likely that the police could have foreseen that the statement would be a product of their illegal conduct and, therefore, that the desire to obtain a confession might have been a motivating factor behind the initial arrest. In such cases, exclusion of the confession is the best way to deter similar misconduct in the future.

The parallels between the circumstances in Brown v. Illinois, supra, and this case are striking. Brown was arrested without probable cause as a suspect in a murder investigation. At the station house, following a period of unbroken detention, the police brought out their file on the investigation and confronted Brown with the information they had obtained. After notifying Brown of his Miranda rights, the officers told him that they knew of an incident in which he had fired a shot from a revolver

into the ceiling of a poolroom. They then informed him that a bullet extracted from the ceiling had been taken to the laboratory for comparison with the bullets taken from the murder victim. Brown then agreed to give a statement. 422 U.S. at 594.

In Brown the Supreme Court identified three factors to be considered in determining whether exclusion of a confession obtained during an illegal detention is necessary. These are the "temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." Id. at 603-04 (citation and footnotes omitted). The Court stated that the burden of showing admissibility rests on the prosecution. Id. at 604.

Applying its three-part test to the facts of the case, the Supreme Court concluded that the State had not met its burden of showing that Brown's statement was admissible. The "statement was separated from his illegal arrest by less than two hours, and there was no intervening event of significance whatsoever." Id. The Court reached this conclusion even though Brown had confessed only after

learning of the evidence against him. The Court also found that the illegality of the arrest had "a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was 'for investigation' or for 'questioning.'" Id. at 605.

The Supreme Court's reasoning and holding in Brown, completely ignored by the majority, require suppression of Barry's statement in this case. First, although Barry made his statement after eighteen hours of detention instead of two, the difference is not significant because it was a period of unbroken custody. Indeed, one case cited in Brown to illustrate the relevance of the time between an arrest and a statement, 422 U.S. at 603 n.8, ordered the suppression of a statement made forty-two hours after the illegal arrest. See Hale v. Henderson, 485 F.2d 266, 267-69 (6th Cir. 1973), cert. denied, 415 U.S. 930 (1974). The events occurring during the detention, not the mere passage of time, are the significant factors in determining whether exclusion is necessary because the illegal arrest has not been attenuated. See 3 W. LaFave, Search and Seizure §11.4 at 633-34 (1978); Comment, The Fourth Amendment and Tainted Confessions: Admissibility as a Policy Decision, 13

Hous.L.Rev. 753, 764-66 (1976). As Justice Stevens has said, "[i]f there are no relevant intervening circumstances, a prolonged detention may well be a more serious exploitation of an illegal arrest than a short one." Dunaway v. New York, supra, 442 U.S. at 220 (concurring opinion). Since the mere passage of time after an illegal arrest is by itself not determinative, the other two factors — the presence of intervening circumstances and the purpose and flagrancy of the police conduct — are the crucial issues in the inquiry.

The majority holds that the disclosure of Archie Murphy's confession and the display of weapons used in the crime to the defendant constituted an intervening event breaking the causal chain between the illegal arrest and defendant's confession. Ante at __ (slip op. at 10-11). I fail to see the relevance of this event to the attenuation doctrine, the purpose of which is to determine whether exclusion of a challenged piece of evidence will serve as a deterrent to similar police misconduct. Although the Supreme Court has not defined "intervening circumstances," the examples contained in the Court's opinions indicate that the event must create a demonstrable break between the illegal arrest and the confession, such as through actual release from detention, see Wong Sun v. United States, supra, 371 U.S. at 491; appearance

before a neutral magistrate, see Johnson v. Louisiana, 406 U.S. 356, 365 (1972), cited in Brown v. Illinois, supra, 422 U.S. at 604; or consultation with counsel, see Brown v. Illinois, supra, 422 U.S. at 611 (Powell, J., concurring); Pennsylvania ex rel. Craig v. Maroney, 348 F.2d 22, 30 (3d Cir. 1965), cited in Brown v. Illinois, supra, 422 U.S. at 603 n.8. Nowhere does the Court suggest that mere confrontation with evidence of guilt during interrogation is sufficient to attenuate the taint of an illegal arrest. The holding in Brown is strong evidence to the contrary. As in this case, the defendant in Brown was confronted with the evidence that the police had against him immediately before he gave a statement. Unlike the majority in this case, however, the Supreme Court held that "there was no intervening event of significance whatsoever." 422 U.S. at 604. Furthermore, as the majority itself recognizes, ante at __ (slip op. at 8), the factors in Brown must be evaluated in light of the purposes of the exclusionary rule. This is the very kind of case where suppression is most necessary for deterrence. If the facts of this case present sufficient intervening circumstances, then police will have little incentive to refrain from illegally arresting someone upon mere suspicion and detaining him in hope that the investigation will uncover evidence of guilt with which to confront the suspect and perhaps obtain a confession.

The conclusion that suppression is necessary here is supported by the third factor in Brown: the purpose and flagrancy of the police conduct. Although the manner in which defendant was arrested was not so flagrantly abusive of personal liberty and privacy as the arrest in Brown, the Supreme Court's decision in Dunaway v. New York, supra, establishes that police conduct need not be threatening and frightening before suppression is justified. Rather, the purpose of the violation is the significant factor. Id., 442 U.S. at 218. Here, as in Dunaway and Brown, defendant was arrested without the slightest trace of probable cause "in the hope that something might turn up." Id. The need to curb the kind of illegal arrest that occurred in this case is not diminished, as the majority implies, ante at __ (slip op. at 11), by the arresting officer's alleged "innocent although unreasonable belief" in the existence of probable cause. Nor is it significant that Barry's arrest was not "investigatory"; the Fourth Amendment was not adopted solely to prevent investigatory arrests. The Supreme Court has repeatedly stated that "[h]ostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that 'common rumor or report, suspicion, or even "strong reason to suspect" was not adequate to support a warrant for arrest.'" Id. at 213. Because the kind of misconduct that occurred in this case poses so great a threat to

individual liberty, there is a commensurate need for an effective deterrent to remove the motivation for such illegal conduct. Exclusion of evidence that the police will foreseeably obtain by exploiting an illegal arrest is the only effective sanction available. Defendant's confession is that kind of evidence.

At various points in its opinion, the majority observes that because of Archie Murphy's incriminating statement, the police had probable cause to hold defendant by the time they took his confession. Ante at __ & __ (slip op. at 10 & 11 n.3). The majority wisely declines to hold that defendant's statement is admissible for this reason, ante at __ (slip op. at 11 n.3), although its apparent approval of the questionable decisions cited is troubling. "It is axiomatic that hindsight may not be employed in determining whether a prior arrest or search was made upon probable cause." 1 W. LaFave, supra, §3.2(d) at 465-66. Once the illegality of an arrest is shown, the question becomes whether the challenged evidence was obtained by exploiting that arrest and whether exclusion is a necessary sanction. The discovery of additional evidence to support probable cause during the illegal detention in no way breaks the causal chain connecting a statement with the prior illegal arrest. Nor does it eliminate the effectiveness of exclusion as a deterrent. When the police arrest someone based on mere suspicion, they presumably envisage the subsequent

discovery of evidence of guilt. Before the police may interrogate an illegally arrested suspect with assurance that any statement he makes will be admissible, they must make an effective break with the prior arrest, for example, by giving him the opportunity to confer with counsel or by presenting him to a magistrate for arraignment or a probable cause determination.

II

To summarize, Brown v. Illinois requires the suppression of defendant's confession as the fruits of an illegal arrest. Such suppression is necessary to deter future arrests based on nothing more than suspicion. Because I believe that this important principle of law requires the reversal of defendant's conviction, I express no views on the question whether the trial court's refusal to admit the statements of Walter Barry and Mark Jackson under the hearsay exception of Evid.R. 63(10) was harmless error.

I would affirm the judgment of the Appellate Division.

Opposition

ORIGINAL

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

NUMBER 81-5104

EDWARD BARRY,

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vs.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, the State of New Jersey, respectfully requests that this Court deny the instant Petition for Writ of Certiorari seeking review of the New Jersey Supreme Court's decision reinstating petitioner's convictions for felony murder and conspiracy.

QUESTION PRESENTED

1. Whether a confession which follows an illegal arrest is admissible at trial if prompted by events wholly independent of the initially illegality?

STATEMENT OF THE CASE

This case concerns the application of the exclusionary rule to a confession made 18 hours after an illegal arrest, but during a period of lawful confinement. Petitioner was arrested on the good faith but erroneous belief that there was probable cause to detain him in a robbery-homicide case. The missing probable cause factor was supplied several hours after the arrest, when an accomplice implicated petitioner in the murder. While still in custody, petitioner was confronted with the accomplice's statement and he then confessed to the crime.

On these facts, a three judge panel of the Appellate Division of the New Jersey Superior Court overturned petitioner's convictions for felony murder and conspiracy on the grounds that the confession was the fruit of the unlawful arrest. State v. Barry, 171 N.J. Super. 543, 410 A.2d 259 (1979). This conclusion was said to derive from Brown v. Illinois, 422 U.S. 590 (1975) and Dunaway v. New York, 442 U.S. 200 (1979). Id. at . The New Jersey Supreme Court reversed the Appellate Division, also relying on Brown v. Illinois, and Dunaway v. New York, but finding that the confession flowed from petitioner's knowledge of the co-conspirator's cTatement, an event wholly independent of the initial illegality.

Petitioner now seeks review of this decision, arguing that a voluntary confession delivered after an illegal arrest must be considered the fruit of the illegality unless such confession is preceded by "contact with someone independent of law enforcement in a nonconfined setting." (Petitioner's brief, page 12). Respondent asks this court to reject petitioner's "but-for" analysis which would virtually foreclose the possibility

that an individual arrested without probable cause can later voluntarily deliver a statement while still in police custody.

REASONS FOR DENYING THE WRIT

1. The issues below turn upon narrow questions of fact having little relevance to other cases.

The legal issues in this case are not in dispute. Petitioner recognizes that the Fourth Amendment issues raised below are controlled by Brown v. Illinois, supra. Brown established that the exclusionary rule can have no application to statements preceded by an illegal arrest unless there exists a causal connection between the statement and the arrest. Causation was not defined in terms of a "but-for" rule. Instead, the court identified several factors to be considered in determining whether the illegality played any significant part in producing the statements. The ultimate question, that of admissibility, was specifically left open to be decided on a case by case basis. Id. at 603.

It follows that the present case must turn upon its facts. Accordingly, resolution of this case can be of no precedential value to cases involving similar legal issues.

2. The court below fully considered and correctly decided the issues raised in the instant petition.

Relying on Brown v. Illinois, supra, the court below decided that the intervening circumstances which preceded petitioner's confession effectively purged the taint of his illegal arrest. The considerations governing this determination were those identified in Brown, i.e. the temporal proximity of the arrest and the confession, the presence of intervening circumstances and the purpose and flagrancy of the official misconduct. Id. at 603-604.

The facts relevant to these considerations are brief. On January 12, 1976, a police officer was killed in a bank robbery in the town of Montclair. An anonymous tip describing the get-away car used in the robbery led the police to Walter Barry, the petitioner's brother. Walter Barry denied knowledge of the robbery using his brother's name to establish an alibi. On January 15, 1976, Walter Barry confessed his involvement in the crime, as did another co-conspirator, Mark Jackson. However, Walter Barry named only Jackson as an accomplice, while Jackson inculpated both Walter Barry and a third man, Archie Murphy. The police then went to the apartment of a George Dickson in search of Archie Murphy.

When the police arrived at Dickson's apartment building, the petitioner, Edward Barry, was standing outside. Recognizing Barry from a previous bank robbery investigation and believing him to be the fourth man involved in the present robbery-homicide, a detective gave Barry his Miranda warnings and placed him under arrest. Murphy was then apprehended inside, in a third floor apartment. It was about 7:00 p.m. when the two men were taken into custody.

Murphy and Barry were immediately transported to police headquarters in Montclair where they were "slated" on charges of robbery and murder. No attempt was made to question Edward Barry at this point. Rather, attention was focused on the alleged leader of the group, Archie Murphy, and the marked bank bills found in Murphy's possession. Due to the lack of space in Montclair, the petitioner was transferred to Glen Ridge, a neighboring town, to spend the night. It was 11:00 p.m. when he arrived in Glen Ridge. An arraignment was scheduled for the following morning in Montclair.

At approximately 1:30 p.m., Archie Murphy gave a confession in which he inculpated the petitioner. When petitioner arrived in Montclair for his arraignment, he was given his

Miranda warnings and confronted with Murphy's statement. The petitioner then confessed, the arraignment following immediately thereafter.

These facts clearly establish that the petitioner's confession was produced by factors wholly independent of the initial illegality. The illegal arrest merely provided the occasion of initial contact with the police. During the 18 hours which elapsed before he was interviewed by the police, petitioner gave no indication that he wished to speak. He chose to speak only after he was confronted with Archie Murphy's statement. His confession, then, was influenced not by the illegal arrest, but by his realization that the police had full knowledge of his participation in the crime.

Another important aspect of this case is that it lacks evidence of the type of official misconduct to which the exclusionary rule is directed. The petitioner was taken into custody not for an "investigatory purpose" as in Brown, but on the belief that there was probable cause for his arrest. To penalize the police for such errors in judgment serves not to deter police misconduct, but to inhibit prompt responses when they are needed most.

There is no logic to petitioner's argument that the opinion below invites the police to hold a suspect without probable cause in the hope that something will turn up. As indicated by a federal district court,

> The motive for an arrest without probable cause can hardly be strong if the police must thereafter secure independent evidence of the commission of crime. Particularly is this so in light of the requirement that those charged with crime be promptly arraigned. [United States v. Morris, 451 F. Supp. 361 (E.D.N.Y. 1978), rev'd for add'l. factual findings 597 F.2d. 341 (2 Cir. 1979)].

Here, the motives of the police in arresting petitioner can not be doubted in light of the fact that petitioner was not questioned until immediately prior to his arraignment. Had the police intended the arrest merely as a subterfuge for unlawful interrogation, they surely would have approached petitioner long before then. Nor would an arraignment have been planned prior to Murphy's confession if the police were aware they lacked probable cause for the arrest.

These circumstances combine to demonstrate that the court below correctly found that petitioner's confession was a product of his own free will and further, that the policies underlying the exclusionary rule are inapplicable to the present case.

3. The petitioner has failed to demonstrate a conflict of decisions.

Although petitioner alludes to conflicts in various cases decided since Brown v. Illinois, supra, he fails to demonstrate any inconsistencies in the decisions he cites. Several of the cases relied upon by petitioner reveal that the courts have uniformly viewed confrontation with incriminating evidence as an event sufficient to break the causal connection between an illegal arrest and a confession. People v. Gabbard, 398 N.E.2d 574 (Ill. 1979); Commonwealth v. Wright, 332 A.2d 809 (Pa. 1975); see also Commonwealth v. Bogan, 393 A.2d 424 (Pa. 1978)(cited in People v. Gabbard, supra). The foregoing cases support the conclusion reached by the court below.

Petitioner also cites a series of cases in which the absence of an intervening event such as a co-conspirator's confession lead to the suppression of statements made during a period of unlawful custody. United States v. Perez-Esparza, 609 F.2d 1284 (9 Cir. 1980); Martin v. Commonwealth, 592 S.W.2d 134 (Ky. 1979); Williams v. State, 348 N.E.2d 623 (Ind. 1976). In the remaining cases cited by petitioner, confessions were

suppressed where the intervening factor was not independent of the illegality. United States v. Gaines, 555 F.2d 618 (7 Cir. 1977); United States v. Butler, 495 F.Supp. 679 (E.D. Ark. 1980); Commonwealth v. Barnett, 369 A.2d 1180 (Pa. 1977).[1]

The foregoing reveals uniform and accurate interpretations of the guidelines set forth in Brown v. Illinois. There is, therefore, no need for further clarification by this court of the principles established in Brown.

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[1]Petitioner also cites Logan v. Capps, 525 F.2d 937 (5 Cir. 1976). However, the Fourth Amendment issue was not reached in that case and the matter was remanded for further factual findings on the question of causation.

CONCLUSION

For the foregoing reasons, the State of New Jersey respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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